



## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

**[RTID 0648-XD655]**

#### **Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the New York Bight**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; request for comments on proposed renewal incidental harassment authorization.

**SUMMARY:** NMFS received a request from Bluepoint Wind, LLC (BPW) for the renewal of their currently active incidental harassment authorization (IHA) (hereinafter, the “initial IHA”) to take marine mammals incidental to marine site characterization surveys in coastal waters off of New York and New Jersey in the New York Bight, specifically within the Bureau of Ocean Energy Management (BOEM) Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (Lease) Area OCS-A 0537 and associated export cable route (ECR) area. BPW’s activities will not be completed prior to the IHA’s expiration. Pursuant to the Marine Mammal Protection Act (MMPA), prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed renewal not previously provided during the initial 30-day comment period.

**DATES:** Comments and information must be received no later than [INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, and should be submitted via email to *ITP.harlacher@noaa.gov*.

*Instructions:* NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period.

Comments, including all attachments, must not exceed a 25-megabyte file size.

Attachments to comments will be accepted in Microsoft Word, Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>* without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. Electronic copies of the original application, renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at:

*<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>*. In case of problems accessing these documents, please call the contact listed below.

**FOR FURTHER INFORMATION CONTACT:** Jenna Harlacher, Office of Protected Resources, NMFS (301) 427-8401.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are promulgated or, if the taking is limited to harassment, an IHA is issued.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as “mitigation measures”). NMFS must also prescribe requirements pertaining to monitoring and reporting of such takings. The definition of key terms such as “take,” “harassment,” and “negligible impact” can be found in the MMPA and the NMFS’s implementing regulations (see 16 U.S.C. 1362; 50 CFR 216.103).

NMFS’ regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial IHA, NMFS described the circumstances under which we would consider issuing a renewal for this activity, and requested public comment on a potential renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time 1-year renewal of an IHA following notice to the public providing an additional 15 days for public comments

when (1) up to another year of identical, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice is planned or (2); the activities as described in the Description of the Specified Activities and Anticipated Impacts section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a renewal would allow for completion of the activities beyond that described in the DATES section of the notice of issuance of the initial IHA, provided all of the following conditions are met:

1. A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond 1 year from expiration of the initial IHA);

2. The request for renewal must include the following:

- An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take); and

- A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized; and

3. Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed renewal. A description of

the renewal process may be found on our website at:

*<https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals>*. Any comments received on the potential renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested renewal, and agency responses will be summarized in the final notice of our decision.

### **National Environmental Policy Act**

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental take authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS determined that the issuance of the initial IHA qualified for categorical exclusion from further NEPA review. NMFS has preliminarily determined that the application of this categorical exclusion remains appropriate for this renewal IHA.

### **History of Request**

On February 28, 2023, NMFS issued an IHA to BPW to take marine mammals incidental to conducting marine site characterization surveys in coastal waters off of New York and New Jersey in the New York Bight, specifically within the BOEM Lease Area OCS-A 0537 and associated ECR area (88 FR 13783, March 6, 2023), effective from March 1, 2023 through February 29, 2024. On December 21, 2023, NMFS received an application for the renewal of that initial IHA. As described in the application for renewal IHA, the activities for which incidental take is requested consist of activities that are

covered by the initial authorization but will not be completed prior to its expiration. As required, the applicant also provided a preliminary monitoring report which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

### **Description of the Specified Activities and Anticipated Impacts**

BPW's initial IHA included conducting marine site characterization surveys, including high-resolution geophysical (HRG) surveys, in coastal waters off of New Jersey and New York in the New York Bight, specifically within the BOEM Lease Area OCS-A 0537 and associated ECR area. Challenges and delays with procurement, mobilization, and downtime contributed to less survey being completed during the initial IHA period than anticipated.

The surveys were designed to obtain data sufficient to meet BOEM guidelines for providing geophysical, geotechnical, and geohazard information for site assessment plan surveys and/or construction and operations plan development. The objective of the surveys was to support the site characterization, siting, and engineering design of offshore wind project facilities including wind turbine generators, offshore substations, and submarine cables within the Lease Area. At least two survey vessels would operate as part of the planned surveys with a maximum of two nearshore ( $<20$  meters (m)) vessels and a maximum of two offshore ( $\geq 20$  m) vessels operating concurrently.

BPW is proposing to continue to conduct survey activities as per the initial IHA application up to approximately 17,008 kilometers (km) of trackline, which would be conducted over up to approximately 335 days across multiple vessels (in the same manner as the initial IHA). This is a subset of the survey trackline included in the initial IHA. The initial survey plan included 13,268 km of trackline in the ECR survey area and 9,923 km in the Lease Area (total of 23,191 km) using the sparker for all survey activities

as the worst-case-scenario. Through the expiration of the initial IHA, BPW expects to survey 6,183 km of trackline, leaving 17,008 km remaining from the initial request (up to 10,299 km in the ECR survey area and 6,709 km in the Lease Area).

The potential impacts of BPW's proposed activity on marine mammals could involve acoustic stressors and are unchanged from the impacts described in the Notice of the proposed IHA (88 FR 2325, January 13, 2023). Acoustic stressors include effects of the marine site characterization surveys. The effects of underwater disturbance from the BPW's proposed activities have the potential to result in Level B harassment of marine mammals in the specified geographic region.

This proposed renewal IHA is for the remainder of work that will not be completed by the expiration of the initial IHA. The renewal IHA would authorize incidental take, by Level B harassment only (in the form of behavioral disturbance), of 15 species (16 stocks) of marine mammals for a subset of marine site characterization survey activities to be completed in 1 year, in the same area, using survey methods identical to those described in the initial IHA application. Therefore, the anticipated effects on marine mammals and the affected stocks also remain the same. All mitigation, monitoring, and reporting measures would remain exactly as described in the **Federal Register** notice of the issued initial IHA (88 FR 13783, March 6, 2023).

#### *Detailed Description of the Activity*

A detailed description of the marine site characterization survey activities for which incidental take is proposed here may be found in the **Federal Register** notice of the proposed IHA (88 FR 2325, January 13, 2023) for the initial authorization. The location and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notices. The proposed renewal would be effective for a period not exceeding 1 year from the date of expiration of the initial IHA.

#### *Description of Marine Mammals*

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the **Federal Register** notice of the proposed IHA for the initial authorization (88 FR 2325, January 13, 2023). NMFS has reviewed the finalized 2022 Stock Assessment Reports (SARs), which included updates to certain stock abundances since the initial IHA was issued, information on relevant Unusual Mortality Events, and other scientific literature. In August 2023 after the initial IHA was issued, NMFS released its final 2022 SARs, which updated the population estimate ( $N_{\text{best}}$ ) of North Atlantic right whales from 368 to 338 and annual mortality and serious injury increased from 8.1 to 31.2. This large increase in annual serious injury/mortality is a result of NMFS including undetected annual mortality and serious injury in the total annual serious injury/mortality, which had not been previously included in the SARs. The population estimate is slightly lower than the North Atlantic Right Whale Consortium's 2022 Report Card, which identifies the population estimate as 340 individuals (Pettis *et al.*, 2023). The 2022 SAR and NARWC estimates are based on sighting history through November 2020 (Hayes *et al.*, 2023). In October 2023, NMFS released a technical report identifying that the North Atlantic right whale population size based on sighting history through 2022 was 356 whales, with a 95 percent credible interval ranging from 346 to 363 (Linden, 2023). NMFS has determined that neither this nor any other new information affects which species or stocks have the potential to be affected or any other pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA.

On August 1, 2022, NMFS announced proposed changes to the existing North Atlantic right whale vessel speed regulations to further reduce the likelihood of mortalities and serious injuries to endangered North Atlantic right whales from vessel collisions, which are a leading cause of the species' decline and a primary factor in an



ongoing Unusual Mortality Event (87 FR 46921, August 1, 2022). Should a final vessel speed rule be issued and become effective during the effective period of this proposed Renewal IHA (or any other MMPA incidental take authorization), the authorization holder would be required to comply with any and all applicable requirements contained within the final rule. Specifically, where measures in any final vessel speed rule are more protective or restrictive than those in this or any other MMPA authorization, authorization holders would be required to comply with the requirements of the rule. Alternatively, where measures in this or any other MMPA authorization are more restrictive or protective than those in any final vessel speed rule, the measures in the MMPA authorization would remain in place. These changes would become effective immediately upon the effective date of any final vessel speed rule and would not require any further action on NMFS's part.

#### *Potential Effects on Marine Mammals and their Habitat*

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which an authorization of incidental take is proposed here may be found in the Notice of the Proposed IHA for the initial authorization (88 FR 2325, January 13, 2023). NMFS has reviewed the monitoring data from the initial IHA, recent draft SAR, information on relevant Unusual Mortality Events, and other scientific literature, and determined that there is no new information that affects our initial analysis of impacts on marine mammals and their habitat.

#### *Estimated Take*

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the Notices of the Proposed and Final IHAs for the initial authorization (88 FR 2325, January 13, 2023; 88 FR 13783, March 6, 2023). Specifically, the source levels, days of operation, and marine mammal density/occurrence data applicable to this authorization remain unchanged from the previously issued IHA.

Similarly, the stocks taken, methods of take, and types of take remain unchanged from the previously issued IHA. The number of takes proposed for authorization in this renewal IHA are a subset of the initial authorized takes that better represent the amount of activity BPW has left to complete. These estimated takes, which reflect the remaining survey days, are indicated below in table 1.

**Table 1- Proposed Number of Takes by Level B Harassment by Species and Stock and Percent of Take by Stock**

<b>Common name</b>	<b>Authorized Take</b>	<b>Population Abundance</b>	<b>Percent of Population</b>
North Atlantic right whale	11	338	3.3
Fin whale	63	6,802	0.9
Sei whale	15	6,292	0.2
Minke whale	149	21,968	0.7
Humpback whale	27	1,396	1.9
Sperm whale	5	4,349	0.1
Atlantic white-sided dolphin	316	93,233	0.3
Atlantic spotted dolphin	162	39,921	0.4
Bottlenose dolphin (W.N. Atlantic Offshore)	204	62,851	0.3
Bottlenose dolphin (Northern Migratory Coastal)	730	6,639	11.0
Long-finned pilot whale	50	39,215	0.1
Risso's dolphin	38	35,215	0.1
Common dolphin	3,456	172,947	2.0
Harbor porpoise	958	95,543	1.0
Gray seal	861	27,300	3.2
Harbor seal	861	61,366	1.4

#### *Description of Proposed Mitigation, Monitoring and Reporting Measures*

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register** notice announcing the issuance of the initial IHA (88 FR 13783, March 6, 2023), and the discussion of the least practicable adverse impact included in that document and the Notice of the proposed IHA remains accurate (88 FR 2325, January 13, 2023). The following measures are proposed for this renewal:

- *Ramp-up:* A ramp-up procedure would be used for geophysical survey equipment capable of adjusting energy levels at the start or re-start of survey activities;

- *Protected Species Observers:* A minimum of one NMFS-approved Protected Species Observer (PSO) must be on duty and conducting visual observations at all times during daylight hours (*i.e.*, from 30 minutes prior to sunrise through 30 minutes following sunset). Two PSOs will be on watch during nighttime operations;
- *Pre-Operation Clearance Protocols:* Prior to initiating HRG survey activities, BPW would implement a 30-minute pre-operation clearance period. If any marine mammals are detected within the Exclusion Zones prior to or during ramp-up, the HRG equipment would be shut down (as described below);
- *Shutdown Zones:* If an HRG source is active and a marine mammal is observed within or entering a relevant shutdown zone, an immediate shutdown of the HRG survey equipment would be required. Note this shutdown requirement would be waived for certain genera of small delphinids and pinnipeds;
- *Vessel strike avoidance measures:* Separation distances for large whales (500 m North Atlantic right whales; 100 m for sperm whales and all other baleen whales; 50 m all other marine mammals); restricted vessel speeds and operational maneuvers; and
- *Reporting:* BPW will submit a marine mammal report within 90 days following completion of the surveys.

### **Comments and Responses**

As noted previously, NMFS published a notice of a proposed IHA (88 FR 2325, January 13, 2023) and solicited public comments on both our proposal to issue the initial IHA for marine site characterization surveys and on the potential for a renewal IHA, should certain requirements be met. All public comments were addressed in the notice announcing the issuance of the initial IHA (88 FR 13783, March 6, 2023) and none of the comments specifically pertained to the potential renewal of the 2023 IHA.

### **Preliminary Determinations**

BPW's proposed activities consist of a subset of activities analyzed in the initial IHA. In analyzing the effects of the activities for the initial IHA, NMFS determined that BPW's activities would have a negligible impact on the affected species or stocks and that authorized take numbers of each species or stock were small relative to the relevant stocks ( *e.g.*, less than one-third the abundance of all stocks). The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA.

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable adverse impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) BPW's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action; and (5) appropriate monitoring and reporting requirements are included.

### **Endangered Species Act**

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the NMFS Greater Atlantic Regional Fisheries Office (GARFO), whenever we propose to authorize take for endangered or threatened species.

NMFS Office of Protected Resources has authorized the incidental take of four species of marine mammals which are listed under the ESA (the North Atlantic right, fin, sei, and sperm whale) and has determined that these activities fall within the scope of activities analyzed in GARFO's programmatic consultation regarding geophysical surveys along the U.S. Atlantic coast in the three Atlantic Renewable Energy Regions (completed June 29, 2021; revised September 2021). The proposed Renewal IHA provides no new information about the effects of the action, nor does it change the extent of effects of the action, or any other basis to require reinitiation of consultation with NMFS GARFO; therefore, the ESA consultation has been satisfied for the initial IHA and remains valid for the Renewal IHA.

### **Proposed Renewal IHA and Request for Public Comment**

As a result of these preliminary determinations, NMFS proposes to issue a renewal IHA to BPW for conducting marine site characterization surveys in coastal waters off of New York and New Jersey in the New York Bight, from March 1, 2024 through February 28, 2025, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed and final initial IHA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. We request comment on our analyses, the proposed renewal IHA, and any other aspect of this notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: January 25, 2024.

**Catherine Marzin,**

*Acting Director, Office of Protected Resources,*

*National Marine Fisheries Service.*